BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES E. PAVLU	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,052,523;
	)	1,052,524 & 1,052,525
BEACHNER GRAIN, INC.	)	
Respondent	)	
AND	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appealed the January 28, 2011,[1] preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein.

ISSUES

Docket No. 1,052,523

1. On or about September 7, 2010, did claimant suffer a personal injury by accident that arose out of and in the course of his employment?

Docket No. 1,052,524

1. Did claimant give timely notice of the injury he alleges occurred on June 26, 2010?

2. On June 26, 2010, did claimant suffer a personal injury by accident that arose out of and in the course of his employment?

[1] The date on the Order is January 28, 2010, but it appears 2010 is a typographical error.

Docket No. 1,052,525

1. Did claimant give timely notice of the injury he alleges occurred on June 10, 2010?

2. On June 10, 2010, did claimant suffer a personal injury by accident that arose out of and in the course of his employment?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

Claimant worked for Beachner Grain, Inc. (Beachner), for two and one-half years prior to September 7, 2010, the approximate date his employment ceased. Beachner harvests and stores grains for farmers. During harvest claimant's duties were to dump grain trucks, which involved being on his feet, turning on the pit auger by pushing buttons and opening and closing the back gate of the truck so the grain can be dumped.

On June 10, 2010, claimant was on a grain bin platform kneeling down when he bent over to pick up a motor that weighed 75 pounds that was handed to him by yard foreman Kevin Son. When claimant picked it up he ". . . got pain in my back and when I got it up there it shot pains all down through my legs."[2]

Claimant testified he reported the injury at that time to Mr. Son. Claimant then went to the office and reported the injury to manager/area manager Ken Thornton. Claimant alleges he asked for medical treatment, but was not provided with any. Claimant continued to work at Beachner and contends his back worsened and that he told Mr. Thornton every few days about his back pain and that something needed to be done. Mr. Thornton continued to refuse medical treatment for claimant. Claimant did not want to file a workers compensation claim for fear of losing his job.

On June 26, 2010, claimant was asked to travel to Humboldt, which was approximately one and one-half miles from where the claimant was working, to learn how to mix fertilizer by Mr. Thornton. Mr. Thornton and claimant rode a RoGator, which is a 3-wheel vehicle. Claimant alleges he again injured his back due to bouncing from the rough ride and he asked Mr. Thornton after the trip why he would put him on the 3-wheeler when Mr. Thornton knew claimant injured his back two weeks prior. Mr. Thornton then ordered claimant to do a welding job, which caused claimant additional back pain. After Mr. Thornton dropped claimant off at his home at the end of the workday, claimant indicated he called Mr. Thornton and asked for a ride to the emergency room for treatment for his

[2] P.H. Trans. at 11.

back pain, due to hurting his back at work that day. Mr. Thornton allegedly told claimant to have claimant's sister take him to the emergency room because Mr. Thornton was busy.

Claimant's sister took claimant to the emergency room and claimant inferred from Mr. Thornton's attitude that Beachner did not want the situation handled as a workers compensation case. Claimant was given pain medication at the emergency room and was told to follow up with his family doctor. The next day claimant told Mr. Thornton what occurred at the emergency room. Claimant continued working at Beachner after the June 26, 2010, incident. According to claimant, his back became worse. Claimant testified he was continuously telling his employer that his physical condition was worsening.

On approximately September 7, 2010, claimant spilled some corn on the weigh scales but despite claimant saying he would clean up the spill Mr. Thornton "jumped" all over claimant about it. Mr. Thornton told claimant to go home and they would talk about the incident tomorrow. The next day, (which claimant believes was either September 7 or 8, 2010,) claimant worked 45 minutes to an hour before being called to the office, where he was told he was being terminated. Upon hearing the news, claimant felt pressure in his chest and arm and numbness in his leg. Claimant believed he was having either a stroke or a heart attack.[3]

Claimant indicated he told Mr. Thornton that he thought he was having a heart attack or a stroke and that he asked Mr. Thornton if he could take claimant to the hospital. Claimant alleges Mr. Thornton refused to take claimant to the emergency room and Mr. Thornton told claimant to get a ride from Larry. Claimant was taken to the hospital, where he stayed overnight and was discharged. He was told to undergo a treadmill test and an MRI. Claimant has not undergone the MRI due to lack of insurance.

The employer's version of the three accidents varies considerably from that of claimant. Kevin Son indicated that prior to the June 10, 2010, incident, claimant told Mr. Son that claimant had tweaked his back lifting, pushing or pulling a lawnmower. Mr. Son also indicated that because of the back injury caused by the lawnmower claimant asked Mr. Son on June 10, 2010, if claimant could have light duty. Mr. Son acquiesced.

Mr. Son indicates that on June 10, 2010, claimant lifted the 75-pound motor, but claimant never mentioned hurting his back. Mr. Son never sent claimant to the office to report a work-related problem, nor did claimant ever request medical treatment. To Mr. Son's knowledge, up until claimant's termination claimant had not ever reported a work-related low back problem. Mr. Son also indicated it was his understanding claimant was seeing a chiropractor due to the injury involving the lawnmower and he never observed claimant limping. Mr. Son did not provide testimony concerning the June 26,

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[3] *Id.*, at 27-29.

2010, incident and he indicated he was not present during the events leading up to claimant's termination in September 2010.

The testimony of Ken Thornton concerning the June 10, 2010, incident is similar to that of Kevin Son. Mr. Thornton indicates claimant reported no injury to him on June 10, 2010, and never requested medical treatment. Only after claimant was terminated on September 7, 2010, did Mr. Thornton become aware that claimant was alleging a back injury. Mr. Thornton indicated claimant also told him he had injured his back lifting a lawnmower at home and had gone to a chiropractor. Claimant would sometimes take off work to see the chiropractor, but Mr. Thornton did not indicate if this occurred before or after the June 10 and 26, 2010, incidents.

Mr. Thornton indicates that on several occasions he took claimant to Humboldt to mix fertilizer or work with grain, but claimant never complained of a back injury due to a rough ride on the 3-wheeler. On September 7, 2010, Mr. Thornton terminated claimant and told him it was due to claimant's bad attitude, work ethic and several incidents that occurred the previous day. These incidents included claimant throwing tools down and pulling doors open because he was angry and having laid grain out on the scales.

According to Mr. Thornton, after claimant was terminated claimant immediately said his back was hurting and that he wanted to file a workers compensation claim. Mr. Thornton testified this was the first time claimant had ever reported to him a work-related back problem. Larry Powers, a Beachner truck driver, took claimant home and it was not until later that Mr. Thornton was aware claimant had gone to the hospital.

Claimant admits he told Kevin Son and Ken Thornton he aggravated his back "on the lawnmower,"[4] but he alleges he told them after the June 10 and 26, 2010, incidents. The Neosho Memorial Regional Medical Center emergency room records indicate claimant reported that he injured his back pulling hard on a lawnmower.[5] Claimant testified if he told the people at the emergency room he hurt his back at work he would lose his job. Claimant also sought treatment on June 18, 2010, for hemorrhoids and blood pressure issues at Ashley Clinic, where he was seen by Dr. Robert K. Thomen, II, but he did not complain of his back injury.[6]

K.S.A. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends."

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[4] *Id.*, at 34.

[5] *Id.*, Resp. Ex. 2

[6] *Id.*, Resp. Ex. 1.

K.S.A. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence.[7] This Board Member affirms the ALJ and finds claimant failed to meet his burden of proving his three injuries arose out of and in the course of his employment.

Claimant alleges that he incurred three injuries which arose out of and in the course of his employment. Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[8] An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment.[9] The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[10]

In Docket No. 1,052,525, claimant urges this Board to reverse the decision of the ALJ and find claimant's injury arose out of and in the course of his employment. Prior to the June 10, 2010 incident, claimant told Kevin Son he had injured his back lifting, pushing or pulling a lawnmower and asked to be placed on light duty. Claimant indicated he told Ken Thornton on several occasions after June 10, 2010, that claimant's back was hurting him. On June 18, 2010, claimant sought treatment from his family physician for hemorrhoids, but he did not mention his back injury. Claimant indicated he told his family physician that his hemorrhoids popped out from lifting the motor, but the doctor's record does not contain any complaint of a back injury.

Regarding Docket No. 1,052,524 and the June 26, 2010, accident, claimant testified he injured his back riding on a 3-wheeler. Mr. Thornton indicated he never knew claimant was alleging a back injury until claimant was terminated. Claimant's back pain was so severe after the June 26, 2010, incident that he sought medical treatment at an emergency room, where he told emergency room personnel he injured himself pulling hard on a lawnmower. Claimant explained he did this because he was afraid he would lose his job if he turned it in as workers compensation. After going to the emergency room, claimant

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[7] *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

[8] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[9] *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

[10] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

sought no additional medical treatment for his back and continued to work for Beachner until he was terminated on or about September 7, 2010.

In Docket No. 1,052,523, if claimant's version of the events that occurred on or about September 7, 2010, is correct, claimant did not suffer an accident arising out of and in the course of his employment. At the time claimant became anxious and incurred pressure in his chest and arm and numbness in his leg, he already had been terminated. Claimant testified he has taken Xanax for a period of years for anxiety. If claimant did suffer an injury on or about September 7, 2010, while he was employed, the injury was not caused by any work activity.

The ALJ weighed the evidence and impliedly found the recitation of the events by respondent's witnesses to be the most credible. Here, there is evidence claimant suffered a back injury, but claimant has failed to prove it arose out of and in the course of his employment. Because this Board Member finds claimant's injuries did not arise out of and in the course of his employment, the issue of whether claimant gave timely notice of the June 10, 2010, and June 26, 2010, accidents pursuant to K.S.A. 44-520 is moot.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[11] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[12]

WHEREFORE, the undersigned Board Member affirms the January 28, 2011, Order entered by ALJ Klein.

IT IS SO ORDERED.

Dated this ____ day of May, 2011.

THOMAS D. ARNHOLD
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

[11] K.S.A. 44-534a.

[12] K.S.A. 2010 Supp. 44-555c(k).